

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAMIRO RIOS JR.

Claimant

VS.

SHRED-IT

Respondent

AND

NATIONWIDE MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. **1,054,904**

ORDER

Claimant requests review of the May 4, 2012 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

It was undisputed claimant suffered accidental injury on November 18, 2010. At the preliminary hearing the claimant sought treatment for a preexisting Arnold-Chiari malformation of his brain. The Administrative Law Judge (ALJ) found claimant failed to meet his burden of proof to establish the condition was caused by or aggravated, accelerated or intensified by the work-related accident. Claimant requested review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The Board must first address whether it has jurisdiction to review the ALJ's Order. Whether claimant timely filed his Request For Board Review of Preliminary Hearing Decision is dispositive of this appeal. The evidentiary record shows the following facts relating to this issue:

- (1) The preliminary hearing Order was dated May 4, 2012, by the ALJ.

(2) The claimant's Request For Board Review of Preliminary Hearing Decision of that Order was received and filed of record with the Division of Workers Compensation on May 21, 2012.

The right to appeal is statutory.¹ When the record reveals lack of jurisdiction, the Board's authority extends no further than to dismiss the action.² The time interval in which a party must file a written request for Board review of a decision made by an ALJ is governed by K.S.A. 44-551(i)(1) which provides in pertinent part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

K.S.A. 44-525(a) provides in pertinent part:

The award of the administrative law judge shall be effective the day following the date noted in the award.

The ALJ entered the preliminary award on Friday, May 4, 2012. Accordingly, the effective date of the preliminary award was the day after or May 5, 2012, which was a Saturday. The written application for review is only considered timely filed if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the order.³ Excluding intermediate Saturdays and Sundays, 10 days after the effective date of the preliminary award would be May 18, 2012. Claimant's application for review was filed by fax⁴ and received on May 21, 2012. Consequently, the application for review was not timely filed.

Although the 10th day cannot fall on a Saturday or Sunday and intermediate Saturdays, Sundays and holidays are not counted in the 10 days to appeal, nevertheless, a Saturday can be the effective date of an award when that award was entered on a Friday.

Claimant's attorney admits that his office received an e-mail of the ALJ's Order on May 4, 2012. But the claimant's attorney requests the Board to grant a one-day extension

¹ See *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 541, 836 P.2d 1142 (1992).

² See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

³ See K.A.R. 51-18-2(b).

⁴ See K.A.R. 51-18-2(c).

to file the appeal out of time because his assistant was out of town when the e-mail of the ALJ's Order was received and the attorney had a medical emergency that kept him home most of a week.

Some statutes which prescribe the time for an appeal to be filed do permit the extension of the appeal time upon a party's showing of excusable neglect based upon failure to learn of the entry of judgement.⁵ However, K.S.A. 44-551(i)(1), the statute which prescribes the time period to appeal a matter from the ALJ to the Board, does not have language that would give the Board authority to extend the appeal time.

In an administrative proceeding, the time for taking an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal to an appeal.⁶ Accordingly, this Board Member finds that because claimant's Request For Board Review of Preliminary Decision was filed out of time, the Board does not have jurisdiction to review this preliminary hearing Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding, decision, and order of the Board that the Request For Board Review of Preliminary Decision filed by claimant on May 21, 2012, is out of time and should be, and is hereby, dismissed. The Order entered by Steven J. Howard dated May 4, 2012, remains in full force and effect.

IT IS SO ORDERED.

Dated this 13th day of July, 2012.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

⁵ See K.S.A. 60-2103(a); *Schroeder v. Urban*, 242 Kan. 710, 750 P.2d 405 (1988).

⁶ See *State Bank Commissioner v. Emery*, 19 Kan. App. 2d 1063, Syl. ¶1, 880 P.2d 783 (1994).

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2010 Supp. 44-555c(k).

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Steven J. Howard, Administrative Law Judge